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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 552

ALBERT SHANKER, individually and as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO and UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Appellants,

—against—

J. LEE RANKIN, Corporation Counsel of The City of New York, on behalf of The Board of Education of The City of New York,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLANTS

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Appellee's brief, we respectfully suggest, goes far to support the appellants' statement that this Court has jurisdiction of an appeal involving a substantial Federal question. Appellee nowhere contends that the issues are not of a substantial constitutional nature. Appellee nowhere contends that the issues are not of Nation-wide importance to millions of public employees and their families. Nowhere does appellee contend that the issues raised are not of substantial interest to local and State governments throughout the Nation. Appellee nowhere contends that the issues do not arise in a growing and changing area of the law

wherein this Court, on a case by case basis, is determining the respective rights and obligations of public employees and public employers.

Appellee simply uses this preliminary stage of the proceeding to present its arguments on the merits. To this appellants might only state: (1) that the office of its Jurisdictional Statement was to demonstrate to this Court that it does indeed have jurisdiction of this appeal, not to convince the Court of the rectitude of its position; and (2) that the 4-3 division of the New York State Court of Appeals and the opinions of the judges of that Court by themselves demonstrate sufficient merit in appellants' position to entitle appellants to a hearing by this Court on the merits.

Appellants do not intend to do more in this reply than support their position with respect to this Court's jurisdiction. They will reply to appellee's arguments on the merits at the appropriate time.

There are, however, two statements presented in appellee's brief which do warrant reply at this stage of the proceeding.

At page 9 appellee writes:

> "More significantly, appellants offered no proof below and make no contention here that there has been any abuse in this or any other cases involving public employees."

Appellants did not argue abuse in this case because their constitutional rights to equal protection of the laws and due process do not depend on the manner in which the judge in

this particular case acted. Now that appellee has raised the issue, however, appellants forthrightly do state that there was massive abuse of their rights in this case. This can be shown directly from the actual transcript of the record.

The trial judge in this case had clearly predetermined the appellants' guilt of criminal contempt fully one month before the non-jury criminal contempt trial even began—that is, before any evidence in the criminal contempt proceeding had been introduced.

The trial commenced on November 13, 1968. On October 11, 1968 the trial judge said from the bench in open court:

> ". . . you have deliberately, that is, the defendants, defied the lawful mandates of the court." (T. 571, Reply Appendix A, p. 9.)

The above statement was made by the trial judge whose judicial task was to determine the issues of fact as to whether the appellants had committed "wilful disobedience to its [the court's] lawful mandate." Judiciary Law of the State of New York, Sec. 750(3).

The appellants' demand for a trial by jury was not a mere theoretical exercise of a constitutional right to equal protection and due process. It was their only hope for an unbiased trial. (See T. 567-579, Reply App. A, pp. 7-14 for the trial judge's full statement and the colloquy that followed.)

The judge, who formerly had been associated with the plaintiff as one of the attorneys in the Office of the Corporation Counsel, was respectfully asked to disqualify himself. He refused to do so, stating:

> "I have practiced law for forty years. Yes, I was a member of the Law Department. I have been in government for over 34 years. That doesn't disqualify me. It probably makes me more qualified to deal with this question. I can be objective." (Complete motion and ruling at T. 50-51; Reply App. B, p. 15.)

A later motion to have the judge disqualify himself was also rejected. (T. 212, Reply App. B, p. 16.)

The former association of the judge to the plaintiff was particularly important in this case. In order not to overburden the reply brief with excessive detail, appellants simply state that three separate and distinct issues were presented which directly involved the Office of the Corporation Counsel of the City of New York: standing to sue as a plaintiff (T. 63, Reply App. B, p. 17); propriety of acting as attorney when the Board of Education had its own general counsel and legal staff (T. 67, Reply App. B, p. 17); and actual bias and unequal application of the Corporation Counsel's powers of prosecution (T. 1809-1810, 1822, Reply App. B, pp. 18-19).

This case was brought by the Corporation Counsel of the City of New York, representing himself as plaintiff. He styled his papers as "on behalf of the Board of Education of the City of New York." Under questioning, however, the Corporation Counsel admitted that the Board of Education of the City of New York had never authorized the action. (T. 82-83, 96, Reply App. B, pp. 17-18.)

There was the most fundamental abuse of rights in this case. All the dangers to a fair determination in non-jury criminal contempt trials were present. In *Bloom* v. *Illinois*, 391 U.S. 194 (1968) the Court wrote at page 202:

> "Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power."

That observation is particularly applicable here. For in this case we have one branch of the government as plaintiff and prosecutor seeking to have the appellants found guilty of violating the order of another branch of the government, bringing their case before the very judge whose order they allege was wilfully disobeyed, and opposing the submission of issues of fact to a jury.

The abuses in this case are not unique. In another case involving public employees, *City of New York* v. *Social Service Employees Union,* NYLJ, February 5, 1965, p. 16, col. 2, rev'd sub nom. *SSEU* v. *Saypol,* 23 A D 2d 55 (1965), nineteen union leaders were actually compelled by the judge to testify against themselves and their unions under threat of additional contempt charges. In that case the contempt convictions were reversed, but only after nineteen persons had been imprisoned.

Only one other statement by appellee warrants reply at this stage of the proceedings. At p. 10 of its brief, he writes: "Consequently, in the contempt proceeding, the only real issue is whether there is a strike." That is inaccurate. In this case the primary factual issues are: (1) did appellants disobey the court's order; (2) was the appellants' conduct wilful? These are the questions which appellee seeks to keep away from jury determination.

CONCLUSION

A substantial Federal question is raised by this appeal. This Court should note jurisdiction so that the parties may present their full arguments on the merits toward the end that justice be done.

Respectfully submitted,

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APPENDICES

APPENDIX A

Excerpts From Transcript

[567] The Court: What I say now not only is in reply to the statements of all three gentlemen, counsel in this matter, but also to you, Mr. Shanker, and that is why I asked you to come here.

This Court was hopeful that this unfortunate situation would have been amicably settled by this time. It is regrettable that the situation has not been settled, and that you and the UFT saw fit to call this strike again.

Just so that the record will be quite clear about it and, perhaps, place this in perspective, because you should be slightly concerned, Mr. Shanker, on September 9, 1968, by order to show cause of this Court, there was served on you an order which provided, among other things—and I read from the order of that date—meanwhile and pending the hearing of this motion, the defendants and their respective officers, agents, members, representatives, servants, employees, and all persons whomsoever known or unknown, acting in their behalf or in concert with them [568] in any manner, or by any means, are hereby enjoined and stayed from

(a) Engaging in, causing, instigating, encouraging or continuing or lending support or assistance of any nature to any strike, concerted stoppage of work or slowdown in the performance of any duties of employment with the Board.

There are other restraints, and implementations of what I just read, generally speaking.

As a result of that order to show cause, there was a rather lengthy hearing before this Court, on the application for a preliminary injunction in this action, for a per-

manent injunction. This Court, I, signed an order on September 30, 1967, in which I said:

> "Ordered that the defendants, United Federation of Teachers, and Council of Supervisory Associations, and their respective officers"—that includes you, Mr. Shanker,—"agents, members, representatives, servants, employees, and all persons whomsoever known or unknown, acting in their behalf or in concert with them [569] in any manner or by any means, be and they hereby are enjoined and stayed from engaging in, causing, instigating, encouraging or condoning or lending support or assistance of any nature to any strike, concerted stoppage of work or slowdown in the performance of any duties of employment with the Board of Education of the City of New York."

This order was served, I assume, on your counsel, and you are aware of it. You were, thereafter served with an order to show cause signed in this court on September 13, to punish you for contempt of court for failing to obey the restraints contained in the order of September 9th.

In my opinion of September 30, upon which the order I just read was based, I said, among other things, "There is only one underlying principle that has concerned the Court in the consideration of this matter."

And I said this after repeating that I was mindful of the rights of all the parties, not [570] only those before the Court, but those who are not before the Court; and I went into some lengths to talk about the question of due process, job security, tenure, pensions, and all the collateral rights of the members of your association and your federation. I went on to say:

> "The paramount issue is the need for the children of this city to receive their education, which is vouchsafed to them by the constitution. Such need transcends the needs of the parties here involved, and such need must be concerned and dealt with in its application to the entire City of New York, and not just one area of the city."

I am glad to see that everybody has picked that up now, because I wrote that sometime ago.

There is no reason why 900 schools should be closed because of a dispute in one school.

This Court will not permit itself to be trifled with. The orders of this Court should be observed and obeyed. Defiance of lawful [571] orders of a court lead inevitably to the breakdown of law and order.

Transcending the importance of your violations of our statutes is the fact that you are doing so, and you have deliberately, that is, the defendants, defied the lawful mandates of the court.

The defendant union, powerful though it may be, is nevertheless, insufficiently powerful to disdain the law and the courts with impunity. Our existence as a free people is dependent on a healthy respect for law and order.

In this instance, the orders of this Court have been defied. I am going to suggest to you, Mr. Shanker, that you in your wisdom, in your authority, in your leadership—and I know that it takes two to make such bargain; and, perhaps in this instance, more than two—do whatever is required to call off this strike at the earliest possible time. I think it is imperative that the children, the parents of these children and, certainly the children and [572] parents

in communities outside of Ocean Hill-Brownsville, have the education to which they are entitled. There must be other ways of skinning this cat. We are ingenious to do a great many things, and we should be ingenious enough to do this. It serves no purpose whatever to take it out on the innocent. There will be no victors in this thing. Everybody is a loser. And this is one of the reasons I wanted this session this afternoon.

In less than five weeks we have had three work stoppages, three strikes in an area where we can't tolerate one. I am suggesting that you do everything in your power, because you do have a powerful union, and I have a great deal of respect for it. Certainly I respect the union. I always have. But, the rights of the people in this community must certainly be observed and well regarded.

I am going to advance the trial of this action to tomorrow afternoon at two o'clock.

So far as you, Mr. Frankle, are concerned; [573] I am not unmindful of your situation. There is no reason why you can't absent yourself for the time being, with Mr. Shanker being here. So far as Mr. Degnan is concerned, you can have him here on Wednesday. The Court can accommodate you so far as your prior engagement is concerned and I certainly want to. I practiced law long enough to know how imperative it is to accommodate one's self to such things.

I will set it down for two o'clock tomorrow, Mr. Katz. Your proceeding before this administrative agency that you called the Court's attention to commences at nine o'clock. If you are not finished by noon, I wish you would inform the hearing officer there, or the commissioner, if it is before a commission, that this Court takes precedence over an

administrative agency in this regard, and I am ordering you to go to hearing tomorrow.

Since this is a motion to punish for criminal contempt, I would desire that Mr. Shanker, as one of the defendants sought to be punished, be here in person, so there will be no question [574] about it, since it is a motion to punish for criminal contempt.

Is that acceptable to you, Mr. Nathan? Two o'clock tomorrow.

Mr. Nathan: Yes, it is.

The Court: I have a calendar in this court that I must dispose of.

Mr. Frankle, I think that I have made myself clear with you.

Mr. Frankle: Thank you.

The Court: Thank you.

The Court: And Mr. Katz?

Mr. Katz: Yes, your Honor.

May I say just one thing?

The Court: You certainly may.

Mr. Katz: I am disturbed by one comment you made, the statement that the orders of this Court have been defied. I think I quoted you accurately. I think those are the very words you used.

It concerns me because it is almost tantamount to a determination, prior to the hearing, as to whether there has been a contempt.

The Court: You see, Mr. Katz, unfortunately, the semantics of the situation must require that [575] I say what I said, because there has been a defiance, you see, of the order of September 9th, with the restraints in it; and, certainly my order of September 30th, in which I ordered the defendants that they be enjoined and stayed from strik-

ing. I say they have disobeyed, and they have defied these orders.

Now, then, you can't, under any stretch of the imagination, indicate that this Court has come to a conclusion with respect to the contempt motion. The contempt motion deals with punishment, which is separate and apart from the question of a disobedience or defiance of a Court's order.

I say, again, while the language may be the same, I use it in an entirely different context at this point. So, don't take offense at it, because I have not decided the contempt case, because I haven't yet decided the two procedural motions.

I must confess that in this case I have had everything thrown at me, as you know. First, [576] Mr. Shanker traversed service on him. After that was decided, then UFT indicated it traversed service on it.

After that had been made, and that will be decided at tomorrow's session, then I had thrown at me the question of a trial by jury. This must be a landmark decision for a trial court, at any rate, because it has never been before a trial court. And I have undertaken to treat with that, Mr. Katz, as I told you earlier, with all the sincerity and thoroughness that I can, as a lawyer—as a lawyer, I said—mindful of all the implications not only of the case itself, but all the authorities both in this case and in the Supreme Court of the United States.

Mr. Katz: Your Honor, I respectfully disagree with your statement in regard to the contempt. Contempt is not a question of punishment. That is a question which may be reached after a finding is made that there has been a defiance of the order—

The Court: Read the statute, Mr. Katz. The [577] statute says that punishment, you see, is accorded after there has been a wilful disobedience.

In this case, I say that Mr. Shanker disobeyed these orders.

Mr. Katz: That's my very complaint, your Honor. The evidence before you with respect to whether or not a preliminary injunction should be granted is not sufficient for you to reach, as a Judge, a conclusion and determination, both factually and legally, as to whether there has been a disobedience, in terms of contempt of these orders.

The Court: I didn't say, in terms of contempt. You, perhaps, weren't listening and you were, perhaps, anticipating something. I said that Mr. Shanker, and the other defendants in this action, disobeyed the order of Mr. Justice Frank, contained in the order to show cause dated September 9th; and, certainly, disobeyed my order of September 30th. That's all I said. I didn't say there was a contempt, and I didn't say there was a wilful disobedience of those orders. These [578] are matters that will come before me at the contempt hearing, which I have already set down for two o'clock tomorrow.

Mr. Katz: The reason I am so concerned is, you used the word "defied," and defied, it seems to me, connotes a wilfulness, connotes a conclusion that a supposed disobedience—

The Court: Let me put your mind at ease, I have reached no conclusion, and don't let's indulge in sophistry; don't let's deal in semantics. I have reached no conclusion, except one conclusion at this point, that the defendants in this proceeding have been enjoined by two orders of this Court from proceeding in striking; and despite those admoni-

tions, and despite the admonition I gave you to relay to Mr. Shanker on Friday, a strike was called for this morning.

These are the things that I say cause a defiance of the Court's orders.

Now, the question of contempt will be a matter I will have to decide after the hearing. Whether I do it alone, or whether I do it with a jury, will depend upon my opinion that you will [579] have by tomorrow.

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APPENDIX B

Excerpts From Transcript

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[50] Mr. Frankle: May I, your Honor, at this point, most respectfully submit to you, and by this I mean no disrespect to the Court nor to you, nor (sic) Honor. But in this particular proceeding the plaintiff is not the Board of Education. The plaintiff is a Corporation Counsel. And I am wondering, and I am going to ask your Honor, in fairness to all parties concerned, whether or not your Honor feels that by reason of his own background and his association with the Corporation Counsel's Office for all these years, whether or not in all fairness to the parties, perhaps it would be best—I respectfully submit that to your own discretion, your Honor—that you disqualify yourself.

The Court: Having failed in one respect, you seek another. I have practiced law for forty years. Yes, I was a member of the Law Department. I have been in government for over 34 years. That doesn't disqualify me. It probably makes me more [51] qualified to deal with this question. I can be objective. Perhaps a bit more objective than you can. And let me ask you this, sir. Are you familiar with Section 211 of the Taylor Act?

Mr. Frankle: I am, sir.

The Court: That Taylor Act gives the Corporation Counsel, in fact it mandates the Corporation Counsel, to start this proceeding, which he has done. The fact that I was a member of the Corporation Counsel's Office some twenty-odd years ago does not disqualify me, and your application is denied.

Now go on to your next application.

* * * * *

[212] Mr. Fleischman: I expect the Corporation Counsel to put a prima facie case in before I call the witnesses.

The Court: You prefer it that way?

Mr. Fleischman: Obviously. I am not going to offer evidence until I see what he has.

Mr. Nathan: I understood that your Honor directed these two gentlemen to be here today.

The Court: I did direct them, and if necessary, we are not going to play "footsie" here, I am not going to be part and parcel of any game of "footsie" here. If possible the Court will call him if you, Mr. Fleischman, don't want to call him. We know what this is about. This is no secret to anybody.

Mr. Frankle: May I take strong objection.

Mr. Fleischman: I renew the motion to disqualify yourself, your Honor.

* * * * *

[214] Mr. Fleischman: Your Honor, this is not an investigatory proceeding, this is an adversary proceeding and I don't think it is proper for the Court to act as a grand juror or act as a commissioner of one.

[215] The Court: Come, come, you know what I am talking about. I said to Mr. Nathan—

Mr. Fleischman: I surely do, your Honor.

The Court: —if he didn't want to call them, and if they are in court, the Court will call them, because the trial is a search for the truth and that is what I want, the truth, what are the facts. You say there is no stoppage. All right, we will recess now until 2 o'clock.

Mr. Fleischman: I don't think you ruled on my motion to have you disqualify yourself.

The Court: I already did it. I did, but you didn't hear it.

Mr. Fleischman: Thank you.

* * * * *

[63] Mr. Fleischman: At this time I move to dismiss the action on the grounds that this Court does not have jurisdiction and there are not facts set forth in the moving papers, the summons and complaint, which state a cause of action, or in order to give the Court jurisdiction. I base this motion on three separate points. The first point is that the Corporation Counsel of the City of New York has no authority to bring this action. . . .

. . . . . .

[67] I have here a directory of the Board of Education published by the Board of Education in May of this year and it lists Sidney P. Nadel as counsel.

Furthermore, in its table of organization it lists an Office of Legal Services. And I say that in view of the definition of Chief Legal Officer, the Corporation Counsel is not the Legal Officer who can bring this action either as plaintiff or on behalf of the Board of Education.

. . . . . .

[82] Mr. Fleischman: Your Honor, may I ask permission to ask Mr. Nathan a question in connection with this motion?

The Court: You may if it has relevancy.

Mr. Fleischman: Can he advise me whether he ever received or his office received a written communication from the Board of Education authorizing the corporation counsel to institute this action, this party plaintiff?

The Court: I don't think he has to answer it. I will leave it entirely up to his own judgment.

[83] Mr. Nathan: I don't want, your Honor, to become a witness in the case but if that is the only question, I would be happy to answer that I did not.

. . . . . .

[96] The Court: Can I ask counsel a question to assist the Court?

Last year you actually brought it as the Board of Education against Shanker, this year it is brought by J. Lee Rankin, on behalf of the Board of Education against Shanker. Why the distinction?

Mr. Fleischman: Your Honor, this year it is brought up by J. Lee Rankin, plaintiff.

The Court: I have read the caption, I am not going to get involved in technicalities. Why the distinction?

Mr. Nathan: I will advise the Court that the reason that was done was that the Board of Education had not authorized the bringing of this action at the time that it was brought or has it since to my knowledge. * * *

* * * * *

[809] Q. I know. Now, what are the facts that were missing, why did you differentiate that case from this case?

Mr. Nathan: Objection.

The Court: Objection sustained.

Q. What is your method of investigation of facts with respect to possible Taylor Act violations, Mr. Rankin?

Mr. Nathan: Objection, your Honor.

The Court: Objection sustained.

Mr. Katz: I was just interested in the general practice of the office to see whether it was applied equally in this case and in other cases, your Honor.

The Court: There is another way of proving it. If you are interested in proving discrimination here, you prove it properly, but not with this witness in direct examination. This is your witness.

Mr. Katz: Well, your Honor, it seems to me [1810] that I have a right to show that the Corporation Counsel, who you have indicated as an appropriate plaintiff to bring these actions, has acted in a discriminatory manner by asking questions of the very person who is involved.

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[1822] Mr. Katz: Your Honor, the purpose of this examination is quite evidence (sic) now. I am sure that Mr. Nathan has spoken with Mr. Rankin. We are trying to show an unequal application to (sic) the law to the constitutional deprivation of my clients' equal rights. And I think we are entitled to inquire as to how this office has operated in the past and what its standard operating procedure and regular office practice is, and I think these questions are perfectly appropriate to that issue.

The Court: Ask your next question, please. I sustained the objection.

Mr. Katz: May I just hear that, please?

(Last question read back by reporter.)

The Court: I sustained an objection to that question.

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